

EXHIBIT F

1 APPEARANCES: (Continued:)

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1 THE CLERK: 86 C 8947, Flood vs. Owens-Illinois. On
2 trial.

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4 THE COURT: Please be seated.

5 The motions in limine that I have reference to are as
6 follows: There is plaintiff's motion in limine to bar the
7 testimony of Peter Neushul; a like motion to bar the testimony
8 of Dr. James Lockey; a ruling I am going revisit, which we
9 issued an opinion on pretrial; and, then, we have
10 Owens-Illinois' motion to exclude the testimony of Barry
11 Castleman; and, then, I am just going to briefly address the
12 motion in limine to bar or limit the testimony of Lennard
13 Wharton and John Spencer.

14 The first order of business is to tell you that in a
15 prior ruling, when you moved to exclude the deposition
16 testimony of a witness who was not a deposition witness in this
17 case, but in a related case, where the other side had the
18 opportunity to examine him on the subject matter that is,
19 essentially, the same as in this case, with the same motivation
20 on the part of the lawyers to develop the testimony -- because
21 the rule of evidence is broader than that relied on in my
22 opinion, in which case the opinion said since he was not a
23 deponent in this case, he could not testify in this case by way
24 of deposition -- that ruling is, in fact, in error because the
25 rule of evidence is much broader than that.

1 It permits, where you have similar motivations on the
2 part of the examining lawyers to develop the testimony,
3 therefore, that evidence can come in.

4 And the witness I have reference to is William Hazard.

5 So, I am now reversing that ruling and we will permit
6 that deposition evidence to come in.

7 With respect to the testimony of Lennard Wharton and
8 John Spencer, we deferred that. Those motions were denied
9 without prejudice for re-presentment at trial, and that is
10 exactly how we are going to handle those. I will not take
11 those up presently, but I will take them up when and if it is
12 propitious to do so.

13 Now, insofar as the other motions to bar two putative
14 experts on one side and one putative expert on the other side,
15 I would like to hear from the plaintiff as to what you
16 specifically object to with respect to the testimony of Peter
17 Neushul.

18 Why is he not qualified to offer opinions in this
19 case?

20 MR. HERRICK: Your Honor, at this time plaintiff will
21 withdraw the motions with respect to Peter Neushul and with
22 respect to Mr. -- or Dr. -- Lockey.

23 THE COURT: All right.

24 Then I need not decide those, since those motions are
25 no longer pending.

1 Then we have the defense motion to bar the testimony
2 of Barry Castleman.

3 Are you persisting in that motion?

4 MR. FISCHER: Yes, we are.

5 THE COURT: All right.

6 I will hear the plaintiff's argument as to why I
7 should not grant that motion.

8 MR. QUEENEY: Judge, if I might, the motion was based
9 upon, as set forth in my response, what I think to be some
10 serious misrepresentations as to his opinion and as to the
11 methodology that he undertook to get to his opinion.

12 His opinion is not replete with personal opinions, as
13 alleged by the defendant Owens-Illinois. Instead, pursuant to
14 his experience, which is legion -- which is in his curriculum
15 vitae -- he has conducted the most authoritative and
16 comprehensive examination of over a thousand documents with
17 respect to asbestos, when asbestos was --

18 THE COURT: He is not a medical doctor or had medical
19 training?

20 MR. QUEENEY: He does not have medical training, no.

21 THE COURT: And are you saying the materials he
22 reviewed were medical in content?

23 MR. QUEENEY: Some of them were. Some of them were.

24 THE COURT: What makes him qualified to read an
25 article -- aside from whether it is helpful to the jury -- what

1 makes him qualified to read a medical paper, not being a
2 doctor, had any medical training as such, and interpret that
3 document for the benefit of the jury? What makes him qualified
4 to do that?

5 MR. QUEENEY: He is not interpreting any medical
6 opinions. He is recounting facts that are found within
7 hundreds or thousands of documents and relaying those facts.
8 He is not adding or changing a medical opinion. He is saying
9 that Dr. Gloyne in 1935 --

10 THE COURT: Is he not highlighting medical opinion?

11 MR. QUEENEY: He is identifying medical opinion, which
12 is, I believe, something that would clearly assist the jury.

13 Short of that --

14 THE COURT: Did not Judge Grady find him unqualified
15 to do that?

16 MR. QUEENEY: Judge Grady did because Judge Grady
17 thought that he was going to, in fact, interpret medical
18 evidence -- medical opinions.

19 THE COURT: Well, is it not a necessary function on
20 his part, when he reads a medical paper -- which you say is
21 full of facts, right? He is just highlighting facts?

22 MR. QUEENEY: That is correct.

23 THE COURT: You are not suggesting every medical paper
24 is so objective in its tenor, that no medical opinion or views
25 of the author creep in, which requires some evaluation?

1 You are not saying that, are you?

2 MR. QUEENEY: I am not saying -- I am saying it won't
3 creep into his opinion in this case.

4 THE COURT: But is it not a necessary adjunct in him
5 picking and choosing what facts are expostulated in this paper,
6 to have a medical basis to do so?

7 MR. QUEENEY: No, no.

8 When the Saranac Laboratory indicates that they have
9 been hired by Owens-Illinois, and they report back to them and
10 they report back and say, "It causes a fibrosis of the lungs,"
11 in October and November of 1948, that is a fact.

12 THE COURT: Let me ask this: What prevents you from,
13 in the appropriate way and with the appropriate foundation,
14 from presenting this paper to the jury and let the jury decide
15 for itself what is contained in that paper? Especially if it
16 is fact intensive, as you suggest.

17 What prevents the jury from eliminating the middleman
18 and reading the paper for itself and deciding what it says?

19 MR. QUEENEY: Well, I certainly intend to argue the
20 paper; but, to identify which papers were, in fact, published,
21 when you have over a thousand publications --

22 THE COURT: Do you mean you could not prove what was
23 published without the use of this man?

24 MR. QUEENEY: You are certainly going expedite it.

25 THE COURT: Well, do you mean he is going to stand

1 back as some sort of data processor and say, "This was
2 published and this was not"; and, "These are the facts
3 contained in this paper," and "These are the facts contained in
4 that paper"?

5 MR. QUEENEY: He is, indeed. And he will identify the
6 dates when -- for, example one of the questions --

7 THE COURT: What scientific basis does he lend to the
8 exercise?

9 MR. QUEENEY: It is not a scientific basis to the
10 selection of the report, but it is of assistance to the jury to
11 say that these documents were available at these periods of
12 time, which goes directly to their duty to determine and
13 discover that information.

14 THE COURT: He has discriminated among publications
15 and documents that he is going to rely on to present facts to
16 the jury?

17 MR. QUEENEY: No.

18 THE COURT: He does not? He is going to do them all
19 -- every paper ever written on the topic of asbestos and
20 asbestosis and mesothelioma -- without discrimination?

21 That cannot be, can it?

22 MR. QUEENEY: Well, he is going to select from the
23 mass of publications.

24 THE COURT: Right.

25 And my question is: In order to satisfy Daubert,

1 there has to be some testing -- some methodology; whether it is
2 subject to the standards of peer review or in some other way --
3 it cannot be purely subjective. There must be some recognized
4 method that we can have confidence in.

5 And my question is: What method is there to evaluate
6 whether his selection process was done in a way that other
7 people in the field would recognize as being appropriate,
8 whether scientific or whatever other standard you use?

9 MR. QUEENEY: Well, I think if you look at his CV, I
10 believe that his educational experience is such that he could
11 select articles.

12 I don't have it in my head exactly what his Ph.D is
13 in, but I know that it was heavily involved in the very process
14 that you are talking about.

15 THE COURT: What else do you want to tell me, that I
16 should consider before I rule?

17 MR. QUEENEY: I would also suggest to you that I do
18 not think that Daubert imposes a scientific selection process
19 --

20 THE COURT: No, it does not impose a purely scientific
21 process, but it imposes at least a like test. There has to be
22 some methodology. It cannot be so subjective that it is not
23 subject to some broader acceptance or confidence building or
24 supporting approval, if you will.

25 It cannot be someone who comes in and says, "Trust me,

1 I know what I have done."

2 He not only has to be qualified, but some methodology
3 employed has to meet some rigor. Otherwise, it is purely
4 subjective and we have not advanced the cause of justice.

5 MR. QUEENEY: I do not think it's -- what I want to
6 tell you is it is not subjective. He went to the library and
7 looked for and found every book that mentioned asbestos.

8 He then identified those books. He then identified in
9 1935 that Dr. Gloyne, for example, had indicated he had
10 connected or associated cancer with asbestos exposure, and it
11 was published at a certain point in a certain periodical.

12 THE COURT: And the jury could not read that article
13 for itself?

14 (No response.)

15 THE COURT: What dimension does he bring to the jury
16 other than he went to the library and is the repository for
17 this information? What does he bring to the exercise?

18 MR. QUEENEY: He brings exactly that. He brings a
19 selection process where he went through hundreds and thousands
20 of documents and said, "Here is what was out there available.
21 Here is what Owens-Illinois -- Mr. Hazard, their industrial
22 hygienist; Dr. Shook, the medical examiner -- could have found
23 had they looked in the library."

24 THE COURT: And you --

25 MR. QUEENEY: That bears directly upon, I believe,

1 their question of notice.

2 THE COURT: And you think no medical expertise or
3 training is required to do the very thing you are suggesting he
4 does?

5 MR. QUEENEY: I do, indeed.

6 THE COURT: Although Judge Grady thought to the
7 contrary.

8 MR. QUEENEY: Judge Grady did rule that way. That is
9 correct.

10 THE COURT: Yes, he did.

11 MR. QUEENEY: And, since that time, he has obtained a
12 Ph.D. -- which, I believe, is a Ph.D. that covers, in fact, the
13 same subject matter that you and I are talking about --

14 But since that time, he has been approved by, you
15 know, hundreds of other judges.

16 THE COURT: Well, I am going to exclude him for the
17 reason offered by Judge Grady and by the opinion in the Ninth
18 Circuit, which I found compelling.

19 I think Judge Kazinsky says he has created himself to
20 be an expert by reading more than the average person.

21 He does not have a medical degree. He is going to
22 read papers and tell the jury what those papers say. And, yet,
23 he is not qualified medically to render a scientific or medical
24 opinion about the contents of those.

25 Your argument or your explanation to that is that,

1 "Well, he is only going to be talking about facts. He will not
2 be talking about any opinions, either offered in the paper or
3 some that he develops himself," which I think you admittedly
4 say he cannot do because he is not a medical expert.

5 It does not quite make any sense to me how he is going
6 to assist this jury; and, I also cannot understand how he can,
7 if you will, discriminate among the papers he reads; decide
8 what he personally thinks is important, that the jury should
9 know; and, what the jury should not know. That is an exercise
10 of some opinion or some discretion.

11 And there is no standard to demonstrate that this is
12 anything other than purely subjective. And, so, for those
13 reasons -- I know the Illinois Supreme Court also struck his
14 testimony in another case, which I have also read, but they did
15 it for the reason that he assumed the existence of a
16 conspiracy. In that case, there was a conspiracy involved. He
17 assumed the existence of a conspiracy.

18 Just, coincidentally, in a criminal case, I would
19 never let some expert opinion come and tell this jury whether a
20 criminal conspiracy got proved. So, whether the Illinois
21 Supreme Court was being kind or simply relied on the fact that
22 he assumed the very issue about which the trial was being held,
23 I do not really know.

24 But I know that they discounted his testimony entirely
25 for the point offered; Judge Grady did for the reasons that I

1 found compelling; and, Judge Kazinsky, in his dissent in the
2 California case in the Ninth Circuit, found the same thing.

3 And I must say that for him to do what he is doing,
4 either there has to be either some scientific or equivalent
5 basis to test whether or not other experts in the field could
6 do what he did, without making it an entirely subjective
7 proposition.

8 There is not any showing of that. So, what he has
9 done, if you ask me, is purely subjective.

10 And then you get into the hornets nest of him not
11 being a medical expert, and necessarily making medically-
12 qualitative decisions and opinions.

13 And the third thing is, to the extent that these
14 documents have very relevant facts to be presented, the jury is
15 as capable of consuming and understanding those facts as he is
16 in portraying them from the author to the jury.

17 He is, if you will, acting a middleman, and I do not
18 think that is sufficient expertise to do anything in this case
19 relevant to giving him a license to both offer his opinions de
20 facto or de juri.

21 He offers opinions de facto by selecting those things
22 he wants the jury to hear. There is some qualitative judgment
23 call for it. And there is not the least scientific basis for
24 doing that.

25 So, that motion is granted and his testimony will be

1 excluded.

2 Those are all of the things that I have at this time.

3 I will see you at 2:00 o'clock and we will go on with the trial
4 of the case.

5 MR. FISCHER: Your Honor, if I may, as a housekeeping
6 matter, I think there was one motion in limine that might have
7 slipped past your Honor. It had to do with the manner in which
8 plaintiff's expert calculated damages and what damages were
9 permissible under Illinois law.

10 If you need another copy of that, we can certainly
11 provide that to you.

12 THE COURT: Is that the one that seeks to challenge
13 punitive damages?

14 MR. FISCHER: No, it is not, your Honor.

15 THE COURT: Then I did not see that motion.

16 Do we need to address that before opening statements?

17 MR. FISCHER: No, absolutely not. But I just wanted
18 to point that out.

19 THE COURT: Did you answer that motion?

20 MR. FISCHER: Yes, he has.

21 THE COURT: All right.

22 I, frankly, do not recall seeing either one -- either
23 the motion or the answer. So, if you could supply me with
24 those, I will take a look at them.

25 MR. FISCHER: Thank you, your Honor.

1 THE COURT: All right.

2 2:00 o'clock for opening statements.

3 (Whereupon, a recess was taken at 12:45 a clock p.m.
4 until 2:00 o'clock p.m. of the same afternoon, March 15,
5 2004.)

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8 I certify that the foregoing is a correct excerpt from the
9 record of proceedings in the above-entitled matter.

10 _____, 2004
11 Official Court Reporter

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